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Supreme Court, U. S.
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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1938

A. E. McDONALD, PETITIONER

v.

ERNEST O. THOMPSON ET AL., RESPONDENTS

PETITION OF INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OF A. E. McDONALD, PETITIONER

DANIEL W. KNOWLTON,
E. M. REIDY,
For Interstate Commerce Commission.

DECEMBER 30, 1938.



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The opinion of this Court reads in part as follows:

> * * * The expression, "in bona fide operation", suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.
>
> As petitioner is not protected in his operation as a common carrier by the proviso,

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we need not consider to what extent, if at all, the federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner.

In the administration of the Motor Carrier Act, 1935, the Interstate Commerce Commission was confronted at the outset with approximately 90,000 applications which were filed under the second proviso of Section 206 (a) and the first proviso of Section 209 (a) for authority to operate in interstate commerce. Each of these applications involves a finding by the Commission as to whether or not the applicant was operating in good faith on the statutory date and has continued such operations since. Because of the volume of its task the Commission has been unable as yet to pass upon all of these applications. Among those so filed with the Commission and thus undetermined is the application of the present petitioner. In many of these cases question has arisen as to whether the applicant conformed during the statutory period with various laws of the various States through which applicant operated, the contention having been made that a violation of a State statute by an applicant constitutes a breach of good faith, and the operation thus was not a "bona fide operation."

The Commission first announced its interpretation of this phrase in *Slagle, Contract Carrier Application*, 2 M. C. C. 127. As appears from the report in that case, the Commission had the benefit

of the participation in the case of a large number of parties representing almost every conceivable interest, including the respondents in this case and their present counsel. The Commission adopted the unusual course of issuing a preliminary report expressing its tentative conclusions, then inviting all interested persons and public bodies, without formal intervention, to file exceptions to that report. It received and considered numerous briefs and heard oral arguments concerning its tentative conclusions before its final conclusion was reached.

For the convenience of the Court the entire text of the Commission's discussion in the *Slagle case* of the point here under consideration is annexed hereto in an appendix. In effect its conclusions were that mere non-compliance with a State law is not by itself sufficient to brand a carrier's operations with the stigma of bad faith; that there must be additional elements, such as operations begun, as a mere show, with knowledge of impending legislation, not in pursuance of any well conceived plan of furnishing transportation service, but for the purpose of securing rights to operate having in themselves a money value, or operations conducted surreptitiously or involving some other element of pretense or concealment for the purpose of preventing State authorities from having the opportunity of enforcing statutory requirements. The right of the States to enforce their own valid laws affecting interstate carriers was emphasized, but it was pointed out that for this Commission to

determine the meaning or validity of State laws and regulations in connection with the issue of good faith, would require the exercise of its part of judicial functions.

In a series of cases following the *Slagle case*, other illustrations of conduct on the part of carriers which failed to measure up to the standard of good faith appeared. Some twenty-five cases have been decided by the Commission in which the general principles announced in the *Slagle case* were adopted and applied. A large number of other cases have also been decided on the same principles without specific discussion of the point.

In brief, the opinion at which the Commission arrived was that it is not inconsistent with good faith for a carrier in innocent ignorance, or through acquiescence of State authorities, or because the State law was dormant, or through honest doubt of the validity or applicability of a State law to fail to comply therewith. It has considered that prior to the passage of the Act, cost of the States had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend such regulations in various respects to those engaged in interstate or foreign commerce; that there were a great variety of such laws and like variations in enforcement; that some such laws were ambiguous and obedience to them was dependent upon the proper interpretation thereof. In other cases the constitutionality of State laws, particularly as applicable to interstate

or foreign commerce, had been challenged or was extremely doubtful. It was further pointed out that it was frequently difficult for a carrier operating in several States to ascertain that statutes affecting him had been enacted or to keep abreast of the fluctuating regulations of the various State Commissions having the effect of law. In other cases the State statutes, as applicable to interstate carriers, were dormant and neglected. The Commission concluded that Congress had this situation in mind when it enacted the Motor Carrier Act, and consequently made no positive or definite declaration that any violation of a State law would suffice to deny an applicant the benefit of the "grandfather" clause. On the contrary, it omitted any reference to compliance with State laws in this connection, and cared for the subject in a different way, i. e. by imposing upon the Interstate Commerce Commission the duty to ascertain from consideration of all the circumstances in each case whether the operation was or was not in good faith. It further held that a contrary view would cast upon it the inevitable duty of construing State laws, of determining their validity in respect of interstate or foreign motor transportation, and of determining their applicability to such commerce. These are judicial functions which the Commission determined that it had no authority to perform.

A striking illustration of the practical difficulties which would attend the attempt by this Commission to apply a rule that non-compliance with every pro-

vision of a State law is a breach of good faith is found in the present case. The State law here in question specifically requires proof of the convenience and necessity of common carrier motor operations over the highways of that State. (See Sec. 3 of Texas Act set forth in the brief of Interstate Commerce Commission herein, p. 3.) That is the only requirement in respect of operating authority contained in the statute which is applicable to petitioner. Yet the respondents, the Railroad Commission of Texas, charged with the duty of enforcing that Act, aver in their answer (Tr. p. 32) that the Railroad Commission "will not require applicant (McDonald) to prove that public convenience and necessity requires the proposed service." If the fact of mere non-observance of a State law is to be the criterion of the carrier's rights under the federal Act, the Interstate Commerce Commission, in passing upon an applicant's case, may find itself confronted by the question whether his rights are to be measured by compliance with the literal terms of the Texas Act or with whatever requirements may be made by State officials whether at variance with the Act or no.

The converse of this situation has also arisen in many instances when the requirements of State officials are challenged as being in excess of their powers conferred by the State laws under which they are acting.

It is apparent that the determination of such questions involves the exercise of powers which this

Commission has felt are beyond its jurisdiction as an administrative agency of Government. It can decide such questions quite properly under the principles which it adopted in the Slagle and other cases. But if it is called upon to decide the constitutionality, validity, and meaning of State laws, and the propriety of the interpretations and acts of the officials enforcing them, it doubts both its jurisdiction and its ability to perform the task.

For these reasons the Commission has felt it desirable to file this petition, as amicus curiae, in support of McDonald's petition for rehearing, to present to this Court a statement of some of the problems with which the Commission is confronted, and respectfully to urge that a reconsideration be had of the important point involved in connection with the term "bona fide operation" hereinabove stated.

The Commission has proceeded upon the assumption that the question of the good faith of a motor carrier operation was one of fact, the determination of which in the first instance was entrusted to the Commission by the statute. Sound and uniform administration of the Act would seem to require that the Commission first determine that question in the many applications pending before it. That course has been followed in respect of many other subject matters heretofore committed to the Commission's jurisdiction, such as rate reasonableness (once a court question as to damage), unjust discrimination, public interest, and the like.

A difference undoubtedly exists, at least as to the extent to which judicial review may be had of a given question, whether it has been committed to the Commission by statute or whether it has not. This Court, in *Shields* v. *Utah Idaho Central R. R. Co.,* No. 28 October term 1938, decided on December 5, 1938, said:

> With respect to that question, unlike the case presented in *United States* v. *Idaho,* 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question, the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority.

This being so, those whose applications for operating author v are decided by the Commission according to a uniform rule and course of decision may find themselves in different status from those whose rights are determined by the various courts which may have no uniform conception of the problem or the standards by which it is to be solved.

If the Commission has been wrong in the assumptions it has made, or in its conclusions expressed in the *Slagle case,* further questions arise. Among them is whether mere noncompliance with the laws of a State, under whatever circumstances, is defiance of those laws, or whether "defiance" is

limited to the intentional and willful violation of a statute known to be properly and legally applicable to the person involved. The many variations of State statutes and regulations in existence, the doubt as to their applicability, their dormant state in many cases, make the problem a difficult one.

A further question is as to whether the statement in the opinion that the expression, "in bona fide operation", in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire applies to transportation in interstate or foreign commerce. If it applies to the use of State highways in interstate commerce, the opinion of the Court would answer the question the answer to which it expressly withholds in the succeeding paragraph of the opinion. The Court there stated that it need not consider to what extent, if at all, the Federal Motor Carrier Act superseded the State Motor Truck Law. However, if the phrase "in bona fide operation" is to imply recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire in interstate commerce, the question of the supersession of the State laws by the federal law is thereby decided.

Many motor carriers have a vital interest in the problem presented. The interest of the States and of the public therein is widespread and real. For these reasons, in addition to that of the ad-

ministrative situation facing the Commission, it is respectfully requested that the petition for rehearing of petitioner, A. E. McDonald, be granted.

DANIEL W. KNOWLTON,
E. M. REIDY,
For Interstate Commerce Commission.

DECEMBER 30, 1938.

I, Daniel W. Knowlton, Chief Counsel for the Interstate Commerce Commission, Amicus Curiae in the above entitled cause, and a member of the Bar of the Supreme Court of the United States, do hereby certify that the foregoing petition in support of petition for rehearing is presented to the Court in good faith and is not presented for the purpose of delay.

DANIEL W. KNOWLTON,
Chief Counsel.

APPENDIX

Excerpt from *Slagle Contract Carrier Application, 2 M. C. C. 127, 138.*

> Under the interpretation of the act urged upon us by some of the State authorities and by the railroads, we would be forced to deny the application in its entirety, because of the failure of applicant to establish the fact of compliance, on the "grandfather" date and to some extent thereafter, with laws of these two States involving the right to operate in interstate commerce therein, one of which States must be traversed in all of his operations. It may be that some of these protestants would concede that applicant exhibited sufficient diligence and willingness to comply with the applicable State laws to warrant a finding that he acted in good faith, but the above is in general, we believe, a correct statement of protestants' position. Is this a sound view of the law, and, if not, how should it be interpreted?
>
> Prior to the passage of the act, most of the States had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in enforcement. Enforcement was vigorous in some States and lax in others, and, as was natural, laxity was more prevalent as to interstate opera-

tions. In the absence of Federal regulation, the situation was a most difficult one for the States, which was one of the reasons why their regulatory authorities very generally favored such regulation. The records show that Congress was fully informed in regard to this situation. It might readily, in clear and unmistakable language, have made compliance with the State laws a prerequisite to rights under the "grandfather" clauses, and have indicated how we should determine the fact of compliance or noncompliance. This, however, it did not do. Instead, it employed the phrase "bona fide operation," making registration "under any code of fair competition" evidence of such operation on June 1 or July 1, 1935, but saying nothing about State laws, which were not mentioned in committee reports or debates, in connection with the phrase "bona fide operation."

At two places in the act Congress made specific provision for compliance with State laws as a prerequisite to obtaining a privilege. Under section 203 (b) (8) a carrier of passengers is not entitled to an exemption that he might otherwise be accorded unless he is "lawfully engaged in the intrastate transportation of passengers in accordance with the laws of each State having jurisdiction." Under section 206 (a) a carrier who has procured a certificate under State laws authorizing intrastate common-carrier service is relieved of the requirement of making proof of public convenience and necessity for conducting the same operations in interstate commerce. It seems unlikely that if Congress had intended to make compliance with State laws a condition precedent to "grandfather" privileges, it would have failed to make the same specific provisions that it did in respect to other privileges.

It seems clear that protestants' interpretation of the act would, in substance and practical effect, require the exercise on our part of judicial functions in respect of State laws. That is to say, in the absence of either admission by an applicant of law violation or proper proof of conviction of violation in a court of competent jurisdiction, the responsibility of determining the matter would be upon us. The act makes it a prerequisite to a grant of a certificate or a permit under the "grandfather" clauses, not only that applicant was "in bona fide operation" on the date specified, but also that it "has so operated since that time." It follows that, in the absence of admissions or convictions, it would be necessary for us to examine into the conduct of an applicant with reference to applicable State laws over a period of time, which might be long. To determine the fact of compliance or noncompliance, it would be our responsibility, first, to ascertain what the State law is; second, to construe that law; and third, to apply it as construed to the facts of the case. The responsibility to determine whether a law has been violated would also, presumably, carry with it a responsibility to determine whether the law itself is valid, for a statute without legal force could not operate to penalize one who failed to comply therewith. Protestants refer to no provision of the act which would imply that we have such broad responsibility and authority in the interpretation and application of State statutes, and we find no such provision.

What might often be involved in such a task is well illustrated by applicant's situation here with respect to the law of Iowa. Whether or not the applicant violated the law of that State is dependent, for one

thing, upon whether he was a contract carrier or a common carrier. At the time he began operations in Iowa, he thought that he was a contract carrier, and he was still of that opinion when he filed his application with us under the "grandfather" clause. We have found that, under the definitions in the act he was and is a common carrier, but whether he was and is such a carrier, rather than a contract carrier, under the statutes of Iowa is another matter. It would require careful consideration of those statutes and interpretation of their provisions. If applicant actually was, under the Iowa law, what he believed himself to be, namely, a contract carrier, he did not violate the law of that State, and at no time prior to this proceeding, apparently, did the State authorities undertake to question his status in this respect.

Moreover, where the fact of noncompliance with State laws is admitted by an applicant or properly proved to us, we cannot accept protestants' contention that this fact alone requires denial of an application under the "grandfather" clause. The words "bona fide" certainly make it necessary to consider also the mental attitude of the offender for, where good faith is involved, the maxim "ignorance of the law is no excuse" loses its force. We cannot ignore the facts that it has sometimes been difficult for motor carriers to keep fully informed in regard to the requirements of State laws, that some States have permitted rather general disregard of certain requirements, and that operators might in good faith challenge the validity of some State statutes affecting interstate commerce. It has, for example, been held repeatedly that a State cannot prohibit or obstruct interstate transporta-

tion by motor vehicle on the ground that the existing similar facilities are adequate. *Buck* v. *Kuykendall*, 267 U. S. 307; *Bush* v. *Malloy*, 267 U. S. 317; *Sprout* v. *South Bend*, 277 U. S. 163. Nor, presumably, can a State accomplish the same result through indirection, by assuming to base its action on other and valid grounds which the facts do not actually support.

In the light of the reasons stated for believing that Congress could not have intended the interpretation of the law urged upon us by protestants, the lack of any clear delegation of authority and responsibility to try in this connection the question of whether State laws have been violated, and the circumstances under which various failures to comply with State laws may have occurred, we conclude that the fact that an applicant under the "grandfather" clause has not complied with State laws is not by itself sufficient to bar his right to authority under that provision of the act.

Protestants argue vigorously against this conclusion, and urge that it amounts to condoning and encouraging violations of the laws of the States, that it leaves the States without any effective method of preventing persistent violators of their laws from obtaining authority to operate within their borders in interstate or foreign commerce, and that for these reasons it is inconsistent with that portion of the declaration of the policy of Congress in section 202 (a) wherein cooperation "with the several States and the duly authorized officials thereof" is required. However, for reasons next discussed we cannot agree that our conclusion herein will have the effect which protestants suggest.

To the extent that State laws are properly applicable to interstate operations they can be enforced by the States, and we can assume that they have been and will be so enforced. Infractions do not, of course, always concern the right to operate. However, in considering the action of the States in enforcement of certain classes of their statutes, the courts have sustained repeatedly their right to forbid operations within their borders in interstate or foreign commerce, until such time as compliance with such laws has been effected. In the event of the failure of an operator to comply with such State statutes, the States have the power to stop his operations, and it is a reasonable assumption that in proper cases they have exercised in the past, and in the future will continue to exercise, such power. Our conclusions in this or any other proceedings cannot affect this right of the States.

Having determined that "bona fide" as used in the act does not mean that an operator must prove compliance with State laws in his operations, there remains for consideration the reasonable interpretation which is to be placed upon this language. The Latin words "bona fide" mean "in good faith." Webster's New International Dictionary defines "bona fide" as "in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely." As defined in Black's Law Dictionary, the words mean "in or with good faith; honestly, openly, and sincerely; without deceit or fraud." The Supreme Court in *Ware* v. *Hylton,* 3 U. S. 199, 241, defined them as follows:

"Bona fide is a legal technical expression; and the law of Great Britain and this coun-

try has annexed a certain idea to it. It is a term used in statutes in England, and in acts of Assembly of all the States, and signifies a thing done really, with a good faith, without fraud, or deceit, or collusion, or trust."

The Supreme Court of the State of Washington, in *State ex rel Great Northern Ry. Co.* v. *Dept. of Pub. Wks.*, 219 Pac. 878, considered an appeal from an order of the Department of Public Works granting a certificate of convenience and necessity to a certain motor carrier. The application was granted upon the ground that the carrier "was actually operating in good faith over the route on January 15, 1921," that date being the statutory date determining rights under the "grandfather" clause in the State act. The court said:

"As we read the Act, the particular provision now under consideration was intended to give a preference right to all operators in good faith, who had been operating without knowledge that the Legislature would so act, and to deny a preference right to those who, after the Legislature began the consideration of the subject, in bad faith commenced to operate for the purpose of forestalling the legislative action."

We are clear that one purpose of the use of the words "bona fide operation" was to deny rights under the "grandfather" clauses to those who, with knowledge of the impending legislation, should make a show of commencing operations, not in pursuance of any well-conceived plan of furnishing transportation service, but for the purpose of thereby securing rights to operate having in themselves a money value. The words may properly be given an even broader applica-

tion to exclude operations conducted surreptitiously or in disguise or involving some other element of pretense or concealment for the purpose of preventing State authorities from having the opportunity of enforcing statutory requirements.

The question, as we see it, is of fact rather than law. Were the operations openly conducted, without any element of pretense, disguise, or concealment, and in such a manner as to indicate a real intent to conduct and maintain a transportation business? Operations so conducted are the "bona fide" operations contemplated by the act. Moreover, where applicant has established the fact of actual operations, not only conducted on the "grandfather" date but continuously maintained thereafter, we think we may fairly assume that they were "bona fide," unless the contrary is shown. In other words, a prima facie case has been established, and the burden is upon protestants having knowledge of the operations to produce for our consideration the evidence of lack of good faith.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 55.—October Term, 1938.

A. E. McDonald, Petitioner,
vs.
Ernest O. Thompson, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 5, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner brought this suit in the federal court for the northern district of Texas against the members of the Texas Railroad Commission and its enforcement officers to enjoin them from enforcing against him the state Motor Truck Law.[1] Respondents answered; there was a trial; the court made findings of fact, stated its conclusions of law, and entered a decree permanently enjoining respondents from interfering with petitioner's business in interstate transportation. The circuit court of appeals reversed and remanded with directions to dismiss the bill. 95 F. (2d) 937. This Court granted a writ of certiorari. — U. S. —.

Section 3 of the state law requires every carrier of property by motor for hire over public highways of the State to obtain from the Railroad Commission a certificate of convenience and necessity. Section 4 makes it the duty of the commission to regulate the transportation, to prescribe rules for safety of carriers' operations, and to supervise all matters affecting relationships between the carriers and the public.

The federal Motor Carrier Act, 1935,[2] § 206(a), declares that no common carrier by motor vehicle subject to its provisions shall engage in interstate commerce unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the operation. A proviso in that section declares that, if any such carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935," over routes for which application is made

[1] Acts Reg. Sess., 42d Leg., 1931, c. 277; Vernon's Tex. Ann. Civ. St., Art. 911b.

[2] Act of August 9, 1935, 49 Stat. 543, 551; 49 U. S. C., § 306(a).

and has so operated since that time, the commission shall issue the certificate without requiring further proof that public convenience and necessity will be served by the carrier's operation. Pending determination of the application, the applicant is authorized to continue operations.

Since some time before the passage of the Act, petitioner has been continuously using Texas highways in interstate transportation of property by motor vehicle for hire. Claiming to have been in bona fide operation as contemplated by the proviso, he made timely application to the Interstate Commerce Commission for a certificate authorizing him to continue to operate over the highways he has been using. The application is still pending, and petitioner insists that, notwithstanding state law, he is entitled to continue operations under the proviso. The question first to be decided is whether his claim of bona fide operation is well founded.

In May of 1934 he applied to the state commission for a certificate authorizing operation as a common carrier in interstate commerce. July 14, 1934, the commission denied the application on the ground that the proposed operations would subject the highways named in it to excessive burden and endanger and interfere with ordinary use by the public. Petitioner appealed to the district court of Travis county and obtained a decree enjoining the commission from interfering with his operations. The court of civil appeals, January 8, 1936, reversed and dissolved the injunction. 90 S. W. (2d) 581. Thus it appears that petitioner's operations have been without authority of the Texas commission and, unless within the proviso of the federal Act, without authority of federal law.

Exact definition of "bona fide operation" is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. *Piedmont & Northern Ry.* v. *Comm'n.*, 286 U. S. 299, 311. To limit the meaning to mere physical operation would be to eliminate "bona fide". That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. *Ex Parte Public Bank*, 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words. The expression, "in bona fide operation", suggests absence of evasion, excludes the idea that mere

ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.

As petitioner is not protected in his operation as a common carrier by the proviso, we need not consider to what extent, if at all, the federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.